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No. 89-7272

In The

Supreme Court of the United States

October Term 1990

RONALD ALLEN HARMELIN,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether the mandatory sentence of life imprisonment without possibility of parole for possession of over 650 grams of cocaine without considering mitigating factors such as no prior record and the fact that the petitioner was not a drug kingpin constitutes cruel and unusual punishment prohibited under the Eighth Amendment?

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OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is published at 434 Mich. 863 (January 29, 1990). The opinion of the Michigan Court of Appeals on reconsideration *sua sponte* is published at 176 Mich. App. 524; 440 N.W.2d 75 (1989). The original opinion of the Michigan Court of Appeals reversing petitioner's conviction, dated January 9, 1989, was unpublished. The judgment of sentence in this case was dated April 30, 1987. Copies of these opinions are reproduced in the Joint Appendix.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 18, 1989, affirming petitioner's conviction and sentence dated April 30, 1987. On January 20, 1990, the Michigan Supreme Court denied petitioner's application for leave to appeal. On April 2, 1990, petitioner filed his Petition for Writ of Certiorari with this Court. The petition was granted on May 29, 1990. Petitioner then filed a request for court-appointed appellate counsel. This Court appointed counsel. The jurisdiction of this Court is invoked under the Eighth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a violation of the Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner Ronald Allen Harmelin was arrested in Oak Park, Michigan, with 672 grams of cocaine in the trunk of his car. He was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(1)(i); MSA 14.15(7403)(2)(a)(i), (Pet. App. – statute) and felony firearm, MCL 750.227b; MSA 28.424(2). On April 30, 1987, he was sentenced by the Oakland County Circuit Court to a mandatory life term of imprisonment with no parole, and a two-year term for the felony-firearm conviction.

In the early morning hours of May 12, 1986, two police officers stopped the petitioner, Ronald Harmelin, for failure to make a complete stop at a red light. The petitioner complied in a cooperative manner upon being requested to produce a driver's license and vehicle registration. Mr. Harmelin voluntarily informed one of the officers that he was carrying a pistol in an ankle holster (Evidentiary Hearing of November 12, 1986, hereafter referred to as EH 1, p. 11). Petitioner then handed the officer a valid permit to carry a concealed weapon. Ultimately, Mr. Harmelin's person was searched and the officers discovered in his pockets some marijuana cigarettes, assorted pills, ten small packets of cocaine, (one such packet was analyzed and found to contain 0.14 grams of a mixture containing cocaine)(J.A. – Trial Exhibit #16, the chemist's lab sheet, p. 2), three little vials of cocaine, and a telephone pager (EH 1, pp. 1-14). Later, the police impounded the 1977 Ford and searched the trunk. The search revealed a closed travel bag. Inside the travel bag was a closed shaving kit bag containing $2900 and two bags containing 672.5 grams of cocaine (EH 2, p. 41). Mr.

Harmelin's fingerprints were found on a book inside the travel bag (Trial Transcript of February 26, 1987, hereafter referred to as TT, p. 98). His fingerprints were not found inside the shaving kit which contained the money and the cocaine (TT, p. 106).

Defendant neither testified in his own behalf nor presented any witnesses. He was convicted as charged and sentenced to mandatory life imprisonment without possibility of parole.

The presentence report reveals that Mr. Harmelin had no prior contacts with the criminal justice system (J.A. Presentence report, p. 1). He graduated from Sterling High School in Sommerdale, New Jersey in 1983. Mr. Harmelin entered the US Air Force and was stationed at Bolling AFB near Washington, D.C., where he was in the Honor Guard for four years. He was honorably discharged in 1967.

The presentence report revealed that petitioner admitted he was a drug addict. He denied an addiction to cocaine which was contradicted by the fact that he had four brass cocaine straws and one cocaine spoon in his pocket, as well as a small amount of cocaine. (J.A. presentence, p. 4)

Petitioner was unemployed at the time of the offense. Petitioner owned the 9 year old Ford automobile and had $597.00 in his pocket. He had no other assets. He resided at an apartment in Detroit. (J.A. presentence report, p. 6)

The presentence report described the petitioner as a largescale drug dealer, estimating the value of the cocaine

he was carrying between $67,000 and $100,000. They offered no proof of his role in the drug trafficking hierarchy, and nothing that would dispute the fact that he was a "mule of transport". The contents of the presentence report were not challenged, indeed they were not mentioned at the sentencing hearing, because of the mandatory nature of the sentencing statute.

On appeal, petitioner argued that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional search; that he had been deprived of the effective assistance of counsel; and that his sentence must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment. The Michigan Court of Appeals reversed his conviction in an opinion dated January 9, 1989, stating that the search was unconstitutional (J.A.).

In an order dated March 9, 1989, the Michigan Court of Appeals vacated that judgment (J.A.).

The Michigan Court of Appeals denied a Motion for Rehearing on April 18, 1989 (J.A.). In an opinion (on reconsideration) dated April 18, 1989, they affirmed his conviction (J.A.).

The Michigan Supreme Court denied leave to appeal on January 29, 1990 (J.A.).

The petitioner filed a petition for writ of certiorari on April 2, 1990. The petition was granted on May 29, 1990.

SUMMARY OF THE ARGUMENT

Ronald Harmelin is 45 years old. He will never live free in our society or any other society again. He has been sentenced to life in prison without parole.

Mr. Harmelin did not kill, attempt to kill, or intend to kill. Mr. Harmelin did not commit an act of violence.

Mr. Harmelin was not a repeat offender who had stubbornly resisted rehabilitation; he was never before even arrested for a crime.

Mr. Harmelin was not convicted of drug dealing. He was not shown to be a drug kingpin. His assets, apart from the drugs, consisted of a nine year old Ford automobile.

For the crime of possession of drugs, he was sentenced to prison for life without parole. The trial judge could not consider any of the good things he had accomplished in his life. The trial judge could not consider the circumstances of the crime. The trial judge could not consider the lack of violence on the part of Mr. Harmelin. The trial judge could not consider Mr. Harmelin's possibilities for rehabilitation. The judge had no choice, under Michigan law, to consider any of these factors. The sentence of life in prison without parole was mandatory. Similarly, the Michigan Parole Board cannot consider his rehabilitation. In this case life without parole actually means life without parole.

Petitioner submits that this sentence, imposed against a first-time offender, without consideration of his individual characteristics, and the characteristics of the offense, violates the Eighth Amendment's prohibitions on

cruel and unusual punishment. *Solem v. Helm*, 463 U.S. 277 (1983). A lawful sentencing scheme must be proportionate, and this Court should consider the factors enumerated in *Solem v. Helm, supra*, i.e. the gravity of the offense and the harshness of the penalty, sentences imposed on for other crimes in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions. Legislatures may not constitutionally provide for disproportionate penalties, and it is the duty of this Court to follow the Eighth Amendment even when the state legislature does not.

In Michigan, only possession of 650 grams or more of a controlled substance and the commission of first-degree murder are subject to mandatory life sentences.[1] No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. Indeed, if Mr. Harmelin had been sentenced in federal court he would have received a much lighter sentence, even the under the new Sentencing Guidelines.

As Circuit Judge Norman Lippitt of the Oakland County Circuit Court observed:

> "Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine. Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor?" *People v. Martin, et al.*, #86-74706 (decided 8/20/87)

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[1] Michigan has abolished the death penalty.

The Michigan statute was aimed at the drug kingpins, but seriously misses the mark. The people being sentenced to life in prison are the mules of transport. The real drug kingpins attract the attention of federal agents, and because they have information of value to the government, they can receive a lighter sentence. The mules of transport, who have no valuable information to trade, end up being sentenced to life in prison.

There is no dispute that drug offenses are serious crimes. However, the view that involvement in drugs is equivalent to intent to murder is not rational. While drugs can cause death, they do so in only a small percentage of drug users. They do not cause death with such regularity and certainty that involvement in drugs expresses an intent to kill.

The standards of our society require that we place the highest level of condemnation on the intentional taking of life. No other crime, however disapproved, rises to that level of evil. All other jurisdictions, both state and federal, provide for a sentencing scheme, that is much less harsh than Michigan's. No other jurisdiction in America equates drug possession with murder as to punishment, because respect for human dignity will not allow it.

The petitioner has been sentenced to mandatory life in prison with no possibility of parole. There is an enormous difference between a lengthy sentence and a sentence of mandatory life with no possibility of parole. It is a difference in kind rather than degree. A prisoner serving a long sentence can still plan and dream. He has a reason to live. The very fact of having no possibility of

release transforms an endurable punishment into a life shattered beyond all hope.

Based on existing precedent, this Court can and should find that this sentencing scheme violates the Eighth Amendment prohibition on cruel and unusual punishment.

ARGUMENT

I. THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF OVER 650 GRAMS OF COCAINE WITHOUT CONSIDERING MITIGATING FACTORS SUCH AS NO PRIOR RECORD AND THE FACT THAT THE DEFENDANT WAS NOT A DRUG KINGPIN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Petitioner Ronald Harmelin was convicted of possession of over 650 grams of a substance containing cocaine, in violation of MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to mandatory life imprisonment without possibility of parole.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *U.S. Const.*, Amend VIII; Mich. Const. 1963, Art.1, Sec.16. Petitioner contends that his sentence of life in prison for the possession of 650 grams of cocaine for a first-time offender without considering any factors or circumstances constitutes cruel and unusual punishment.

A. LEGISLATIVE INTENT OF STATUTE

In 1978, the Michigan legislature passed a bill increasing the penalties for possession of controlled substances. MCL 333.7403; MSA 14.15. Analyzers of the bill identified the problem that despite law enforcement and drug education personnel, there had been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claimed that the state had failed to stem drug traffic because the penalties for drug dealing were not severe enough and law enforcement tools were inadequate. They contended that the potential for profit was so great that Michigan's pre-1978 penalties of up to 20 years in prison posed little or no deterrent to would-be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Proponents of the bill argued that the law would have an important deterrent effect on drug trafficking. They argued that keeping drug dealers off the streets longer would help reduce illicit drug activity. They argued that this bill differed from similar statutes enacted in New York[2], because the Michigan bill was aimed specifically at higher echelon drug dealers.

Opponents of the bill asserted that major drug dealers, the intended targets of the legislation, would use addicts to transport large quantities of drugs rather than take the risk of facing long mandatory prison sentences

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[2] The New York statutes, which were criticized because they did not in reality reduce that state's drug problem, have since been revised. *See New York Penal Law* 220.43.

themselves. If this happened, the drug traffic would continue and only addicts, who were already victims of the drug scene, would be faced with long prison sentences. Opponents further argued that severe mandatory sentences were a simplistic approach to the complex problem of illicit drug activity. They argued that there was no real evidence that severe penalties would serve as a deterrent to crime. Opponents of the law argued that given the potential for profit, new dealers would quickly take the places of those sentenced to mandatory jail terms. Opponents argued that mandatory sentences undermined the modern concept of criminal justice, which endeavors to treat each individual separately and fairly. Lastly, the bill could put an intolerable burden on the state's courts and penal institutions. (Pet. App. see House Legislative Analysis March 23, 1977)[3]

Michigan now has 123[4] individuals serving mandatory life imprisonment without possibility of parole under this statute.

The Michigan Court of Appeals has affirmed the sentences of all the defendants who raised the Eighth Amendment issue. However, the courts are clearly troubled in these cases. The majority in *People v. Harding*, 163 Mich. App. 298, 329; 413 N.W.2d 777 (1987) stated, "We

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[3] Both proponents and opponents thought at the time that cocaine did not have the addictive effect of heroin.

[4] *Michigan Department of Corrections 1989 Annual Report* reports 101 prisoners under this law (17 for possession and 84 for delivery under MCL 333.7401). Another 22 people have been convicted under this law but are currently serving Federal time, after which they will become Michigan prisoners.

are constrained to follow precedent on this issue. The policy arguments presented by the defendants in support of their position are persuasive. We would invite a review by the highest court of the state as we would invite the Legislature to revisit this issue."

Not only has this issue caused conflict in the state appellate court system but also at the trial court level. In a candid opinion, Judge Norman L. Lippitt of the Oakland County Circuit Court disqualified himself from adjudicating a case similar to the one at bar. *People v. Martin, et al.*, #86-74706 (decided 8/20/87). Judge Lippitt stated:

> "Having carefully considered this statute, I have come to the conclusion that this law is the product of emotion, not reason. Politicians, known as legislators, in an effort to respond to community pressure and frustration over a very serious drug problem, rushed to a simple formula, in search of a solution – essentially "throwing away the key for life for any and all individuals who shall possess more than 650 grams of cocaine. However mindlessly throwing away the key will neither deter such crime, nor promote justice. Quite the opposite, bad laws, such as the one at issue here, promote disrespect . . .
>
> Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine. Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor? This is not to say that select drug possessors or dealers should not be sent away for natural life; it is

> simply to say that it makes no sense to mandate such a sentence for this offense and not to do so for many more dangerous offenders. This law has done nothing to ameliorate the bad conditions that exist in the State of Michigan with respect to the possession and distribution of illegal drugs. *Martin, supra,* at 3, 4.

The legislature has the power to define crimes and establish punishment. However, the exercise of that power is subject to judicial scrutiny to ensure that the punishment does not exceed constitutional limits. The judicial enforcement of the cruel and unusual punishment clause "cannot be evaded by invoking the obvious truth that the legislature has the power to prescribe punishments for crimes. That is precisely the reason the clause appears in the Bill of Rights." *Furman v. Georgia,* 408 U.S. 238, 268 (1972) (Brennan, J. concurring). More recently, this Court in *Solem v. Helm,* 463 U.S. 277 (1983) declared meritless the argument that the length of sentence was a legislative prerogative and, therefore, judicial review was precluded. *Solem,* at 288-9 n. 14.

The Michigan Supreme Court has denied leave to appeal in every case on this issue.

B. PROPORTIONALITY IN NON CAPITAL CASES

In 1980, this Court rejected the Eighth Amendment challenge of a Texas recidivist sentenced to life imprisonment in *Rummel v. Estelle,* 445 U.S. 263 (1980). Rummel was sentenced to life imprisonment for his third felony conviction. His three offenses were fraudulent use of a credit card, passing a forged check, and obtaining money

by false pretenses. He appealed, arguing that his sentence was grossly disproportionate to the three felonies that formed the predicate for his sentence.

The Court distinguished Rummel's sentence from those challenged in the death penalty cases, reasoning that the sentence of death differs in kind from any sentence of imprisonment, *Rummel, supra,* at 272. The Court did not preclude the possibility that the Eighth Amendment could be applied to a sentence of imprisonment, however:

> "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, Post, at 288, if a legislature made overtime parking a felony Punishable by life imprisonment. 445 U.S. at 274 n. 11.

The *Rummel* majority relied on the fact that the purpose of recidivist statutes is to deal in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society.

The Court reasoned that in order to qualify for a mandatory life sentence under the statute, Rummel had to satisfy a number of requirements. A felon must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released.

> "One in Rummel's position has been both graphically informed of the consequences of lawlessness and given the opportunity to reform, all to no avail. Art 63 thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of

> incarceration for life, subject only to the State's judgment as to whether to grant him parole." *Rummel, supra,* 445 U.S. at 278.

The Court also relied on the fact that Texas had a relatively liberal policy of granting "good time" credits to its prisoners, a policy that had historically allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. *Rummel,* 445 U.S. at 280. The Court said:

> "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." at 281.

A strong dissent in Rummel expressed the view that the penalty for a non-capital offense may be unconstitutionally disproportionate, and Rummel's sentence was grossly disproportionate to his offenses.

Justice Powell's position with respect to the legitimacy of the Court's proportionality review of non-capital cases was adopted by the majority in *Solem v. Helm,* 463 U.S. 277 (1983). Powell, joined by the dissenters in *Rummel, supra,*[5] and Justice Blackmun held that the defendant's sentence was significantly disproportionate to the crime, and was therefore prohibited by the Eighth Amendment.

Helm was sentenced to life imprisonment under South Dakota's recidivist statute following his seventh felony conviction, which was for issuing a "no account"

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[5] The dissenters include Justices Powell, Brennan, Marshall, and Stevens.

check for $100. His prior convictions were also for non-violent crimes and alcohol was a contributing factor in each. Helm's request for commutation, after serving two years, was denied by the Governor. The district court, relying on the authority of *Rummel,* denied his petition for habeas corpus relief. The circuit court reversed, noting that unlike Rummel, Helm had no possibility of parole.

The Supreme Court affirmed the circuit court's grant of habeas relief. Drawing primarily on its decision in *Weems v. United States,* 217 U.S. 349 (1910), but also on *Coker v. Georgia,* 433 U.S. 584 (1977) and *Enmund v. Florida,* 458 U.S. 782 (1982), this Court held that the constitutional proscription against cruel and unusual punishment prohibits sentences that are disproportionate to the crime committed. It held that no penalty is *per se* constitutional, so that proportionality applies to felony prison sentences as well as capital punishment. The court enumerated factors to be considered in a proportionality review: the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions.

The Court distinguished the *Rummel* decision by relying heavily on the fact that Rummel would be eligible for parole in 12 years, whereas Helm was sentenced to life with no parole.

C. SOLEM ANALYSIS

1. GRAVITY OF OFFENSE

The first criteria addressed by the Court in the *Solem v. Helm* proportionality analysis is the gravity of the offense. "There is no dispute that drug offenses are serious crimes. The issue in this case is not whether declaring war on drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." *Skinner v. Railway Labor Executives Association*, 489 U.S. ___, 103 L.Ed. 2d 639, 109 S. Ct. 1402 (1989) (Brennan, J., dissenting).

However, crimes of violence and danger to society such as murder, rape, and kidnapping have penalties tempered by discretionary and individualized sentencing.

Mr. Harmelin was convicted of possession of over 650 grams of cocaine and possession of a firearm in the commission of a felony. On April 30, 1987 he was sentenced to a mandatory life term of imprisonment with no possibility of parole. Because Michigan has no death penalty, his sentence is the harshest punishment that could be imposed by the state on any criminal for any crime. Mr. Harmelin will have to spend the rest of his life and die in a Michigan prison.

Not to take into account the facts of this particular offense or the history and characteristics of the petitioner is a great miscarriage of justice.

Mr. Harmelin was pulled over by the police for failure to make a complete stop at a red light. The police searched him and found some marijuana, a small amount of cocaine, a beeper, and a revolver, for which he had a valid permit. In the trunk of his car, they found 672 grams of cocaine and $2900 in a shaving kit.

We cannot, as the court did in *Enmund v. Florida*, 458 U.S. 782 (1982), examine the circumstances of the crime in great detail when examining the gravity of the offense. Mr. Harmelin did not take the stand at the trial, nor did he present any witnesses. The record contains no details to help a reviewing court discern the level of drug trafficking involved. Because the sentencing judge had no discretion to consider any sentence other than mandatory life imprisonment with no possibility of parole, the presentence report was not even mentioned at the sentencing hearing (J.A. see sentencing hearing). There was no evidence that the petitioner sold any drugs. There was nothing on the record to indicate that he was anything more than a "mule" of transport. There was certainly no evidence that Mr. Harmelin was a drug kingpin. He exhibited neither wealth nor the lifestyle typically associated with major drug figures. He owned a nine year old Ford automobile (J.A. presentence report). He owned nothing else. He admitted having a drug addiction. It is likely that he was working to support his own drug addiction.

Ironically, had this actually been a large-scale case it would have attracted the attention of the Federal Drug Enforcement Administration. Mr. Harmelin would have probably been brought to federal court where the same charges would have carried much lighter penalties, specifically, five to forty years. 21 U.S.C. 841(b).

The *Solem* court held that "Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices, 458 U.S. at 798. Most would agree that negligent conduct is less serious than intentional conduct." *Solem, supra.* 463 U.S. at 293.

The evidence showed that Mr. Harmelin had a handgun and a permit to carry it. There is no suggestion that Mr. Harmelin attempted to kill or assault anyone. To the contrary, when the police pulled him over, he immediately informed the officers that he had a gun so as to prevent an incident of violence. (Evidentiary Hearing of November 12, 1986, p. 11). This is far from the reckless disregard for human life noted in *Tison v. Arizona*, 481 U.S. 137 (1987). In that case, a prisoner who had been convicted of murdering a guard during a previous escape attempt was aided in a second attempt by members of his family, including his two sons, who smuggled guns into the prison and helped overpower the guards. After the getaway car developed a flat tire, the group decided to stop and steal a passing car. One of the sons flagged down some passing motorists, who were then held by the group at gunpoint, robbed of their valuables, and taken out into the desert. While the sons fetched some water, the prisoner and his cellmate fatally shot the captives. The shooters died of exposure in the desert and the sons were convicted of murder and sentenced to the death penalty.

The Arizona Supreme Court noted that Gary Tison could have anticipated lethal force because he knew that

his father's murder conviction arose out of a killing of a guard during an earlier prison escape attempt. Gary Tison said he would be willing to kill in a very close life or death situation. The Arizona court relied on the fact that Ricky Tison could have anticipated lethal force.

This Court upheld the statute, saying:

> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." *Tison*, 481 U.S. at 156.

The Court continued:

> "We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, one that may be taken into account in making a capital sentencing judgment when the conduct causes its natural, though not inevitable lethal result." *Tison*, 481 U.S. at 158.

Tison differs from the instant case in several ways. There is no evidence to suggest that Mr. Harmelin intended to kill anyone. This offense took place in 1986. Since then an explosive increase in crack cocaine use has resulted in a heightened awareness of the dangers of cocaine. At the time Mr. Harmelin was arrested, cocaine did not have the reputation that it now has acquired. Experts at the time contended that cocaine was not addictive. Indeed, it was scheduled as a non-narcotic in Michigan at the time this law took effect. Nor is death the natural and inevitable consequence of cocaine.

Secondly, by his roadside actions, Mr. Harmelin demonstrated a high regard for human safety in announcing to the police officers that he had a weapon.

Finally, no one was killed.

American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical "to the degree of his criminal culpability." *Cabana v. Bullock*, 474 U.S. 376 (1986), (dissent by Stevens, J., joined by Brennan, J.) citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

The judge in the instant case was not allowed by the statute to consider that the defendant had absolutely no criminal record, that he had not displayed any viciousness, and that he did not demonstrate an inability to reform.

The government would argue that cocaine is a dangerous drug and those who sell it must realize that they are endangering human lives. But many more (hundreds of thousands) of people in this country die from tobacco and alcohol each year, and the sellers and manufacturers also must realize that death can occur. Does this mean that they intend to kill? Are they morally culpable? Surely a person who commits nonconsensual, violent crimes is more morally culpable than the petitioner in the instant case.

Agents of the federal government recently provided cocaine to Mayor Marion Barry. Can it be said that their intent was to cause his death?

2. ANALOGY TO DEATH PENALTY CASES

The Michigan statute at issue in this case provides for apenalty of life imprisonment with no possibility of parole. Petitioner submits that a mandatory sentence of life imprisonment with no possibility of parole is the equivalent or nearly the equivalent of a mandatory death penalty.

In a series of cases beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, *Woodson v. North California*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976), this Court has established a constitutional doctrine of individualized sentencing in capital cases. This doctrine requires that the sentencer must consider any relevant mitigating circumstances of the offense and the offender before imposing the death penalty. *See Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion) (sentencer must not be precluded from considering any aspect of defendant's character or record and any circumstances of the offense)[6], *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (*Lockett* adopted by majority; sentencer may not refuse to consider as a matter of law any relevant mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (exclusion of testimony regarding defendant's good behavior while in jail awaiting trial violated *Lockett* and *Eddings*); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (unanimous opinion) (jury was improperly instructed and judge

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[6] The Court in *Lockett* expressly left open the application of *Lockett* to mandatory minimum sentences in noncapital cases. 438 U.S. at 605, n. 13.

improperly refused to consider mitigating circumstances not listed in statute); *Penry v. Lynaugh*, 492 U.S. ___, 109 S. Ct. 2934, 2947-2952 (1989) (defendant entitled to jury instruction so that jury could give effect to his mitigating evidence).

Society distinguishes between those who acted with and those who acted without a purpose to destroy life. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the defendant was convicted of aggravated murder because she had helped plan an armed robbery and was outside in the car when the pawn shop owner was killed. The Ohio death penalty statute required the trial judge to impose a death sentence unless, after considering the nature and circumstances of the offense and the defendant's history, character, and condition, he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she was under duress, coercion, or strong provocation, or (3) the offense was primarily the product of psychosis or mental deficiency. Ohio Rev. Code § 2929.03-2929.04(B)(1975).

The presentence reports showed that Lockett had a record of several minor offenses, a prior heroin addiction, and no mental deficiency. Her prognosis for rehabilitation was favorable.

After considering the reports and hearing arguments, the judge sentenced Lockett to death. This Court, in a plurality opinion written by Justice Burger, reversed the death penalty. The Court held that the concept of individualized sentencing in criminal cases has long been

accepted in this country. The definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. The Court held that to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

In a concurring opinion, Justice Blackmun stated,

> "I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures . . . but the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where no participant specifically intended the fatal use of a weapon, provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life. 438 U.S. at 997.

Justice Marshall explored the notion of individual criminal culpability in his concurring opinion.

> "Permitting imposition of the death penalty solely on proof of felony-murder necessarily leads to the kind of "lightning bolt", "freakish" and "wanton" executions that persuaded other Members of the Court to join Justice Brennan and myself in *Furman v. Georgia*, holding Georgia's death penalty statute unconstitutional. That the Ohio trial court could impose the death penalty on petitioner under these facts and that the Ohio Supreme Court on review could sustain it, cast strong doubt on the plurality's premise that appellate review in state systems is sufficient to avoid the wrongful and unfair imposition of this irrevocable penalty." 438 U.S. at 622.

In a concurring opinion, Justice White distinguished degrees of criminal culpability. He said, "This is not to question, of course, that those who engage in serious criminal conduct which poses a substantial risk of violence deserve serious punishment. But society distinguishes between the culpability of those who acted with and those who acted without a purpose to destroy human life." 438 U.S. at 626.

Mandatory death penalty statutes of all types, no matter how narrowly drawn, have been struck down by this Court as violative of the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987).

Although the instant case involves life imprisonment without parole rather than capital punishment, the rationale is applicable in both contexts. Like the death penalty, mandatory life imprisonment *without parole* "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty . . . " *Woodson, supra*, 428 U.S. at 304. Indeed, a number of the factors used by this Court in *Lockett* to distinguish capital and non-capital cases – e.g. the availability of probation, parole, work furloughs – are also unavailable under Michigan's life without parole statute. *Lockett supra*, at 605. Thus, this Court's capital sentencing decisions should be applied in determining the constitutionality of the instant statute. *See United States v. Perez*, 685 F. Supp. 990, 1002 (W.D. Tex. 1988), *cert. denied*, 110 S. Ct. 1153 (1989), a pre-*Mistretta* Sentencing Guidelines case wherein Judge Nowlin states:

> "The Court also finds guidance in Supreme Court decisions which mandate that a sentencing judge or jury cannot be restricted from considering all relevant mitigating circumstances when the death penalty is a possibility. [citing *Lockett, Skipper,* and *Hitchcock*] Some distinctions may be appropriate between procedures for capital and noncapital cases because the sentences differ in kind. The Court is of the opinion, however, that the defendant's ability to inform the Court of circumstances and factors unique to him and the Court's ability to consider such factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration."

In *Woodson v. North Carolina, supra,* this Court struck down a North Carolina statute which provided for a mandatory death penalty for all persons convicted of first degree murder. The Court quoted with approval Justice Black's statement of twenty-seven years earlier that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Woodson, supra,* 428 U.S. at 296-297 (quoting *Williams v. New York,* 337 U.S. 241, 247 (1949).

In *Roberts (Stanislaus) v. Louisiana, supra,* decided the same day as *Woodson,* a provision of the Louisiana mandatory death penalty statute defined first degree murder more narrowly than the North Carolina statute and provided for automatic jury instructions on lesser included offenses. The Court did not find these differences to be of constitutional significance and again struck down the mandatory death penalty statute, finding the "constitutional vice" of such statutes to be the "lack of focus on the

circumstances of the particular offense and the character and propensities of the offender." 428 U.S. at 333.

In *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), the Court addressed a mandatory death penalty provision which was even more narrowly drawn. A different Louisiana provision from that in *Stanislaus Roberts* provided for mandatory death if the murder victim was a police officer performing his lawful duties. Nevertheless, the Court struck down the provision as an unconstitutional mandatory statute. 431 U.S. at 636-637.

In 1987, the Court addressed the question which had been expressly left open in previous cases, *see Woodson* 428 U.S. at 287 n. 7; *Stanislaus Roberts*, 428 U.S. at 334, n. 9; *Harry Roberts*, 431 U.S. at 637 n. 5: whether the Eighth Amendment prohibits a statute which provides for a mandatory death penalty as to a prison inmate who murders while serving a sentence of life imprisonment without parole. *Sumner v. Shuman*, 483 U.S. 66 (1987). The *Sumner* Court, after providing a comprehensive summary of this Court's cases comprising the "individualized capital-sentencing doctrine," 107 S. Ct. at 2721-2723, found that even under these extreme circumstances, the Eighth Amendment did not permit a departure from the requirement of individualized sentencing.

This Court has struck as cruel and unusual every statute which has provided for a *mandatory* death penalty. *Blystone v. Pennsylvania*, 494 U.S. ___, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990), and *Boyde v. California*, 494 U.S. ___, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), are not to the contrary. In *Blystone*, the Court upheld a statute which provided that if a jury finds at least one aggravating

circumstance and finds no mitigating circumstances, then it must impose the death penalty. Similarly, in *Boyde* the Court upheld a statute which provided that if a jury finds that the aggravating circumstances outweigh the mitigating circumstances, then it must impose the death penalty. Unlike the statutes in *Woodson* and its progeny, and the Michigan statute in the instant case, the Pennsylvania and California statutes allowed the sentencer to consider any mitigating circumstances and therefore were not impermissibly mandatory.

The reasoning in the Court's capital cases applies as well to the Michigan statute providing for mandatory life imprisonment without parole for possession of 650 grams of a mixture containing cocaine. The unique nature of the penalty of life imprisonment *without possibility of parole* is underscored by this Court's decision in *Solem v. Helm*, *supra*. This Court found that "Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system." *Helm*, *supra*, 463 U.S. at 283-284, citing *Helm v. Solem*, 684 F. 2d 582 (8th Cir. 1982).

The Michigan statute mandating life without parole for a narcotics offense suffers from the same infirmities as the mandatory statutes in *Woodson*, the *Roberts* cases, and *Sumner*, *supra*. These statutes could not withstand Eighth Amendment scrutiny because they did not permit individualized consideration of the offender and the offense. *See Lockett*, *Eddings*, and their progeny, *supra*.[7]

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[7] The Judicial Conference of the United States recently submitted a resolution to the United States Congress urging

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3. EVOLVING STANDARDS OF DECENCY

This Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373 (1910). Thus the Clause forbidding "cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378. *See also Furman v. Georgia; Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*. As Chief Justice Warren said, in an oft-quoted phrase, "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra*.

In *United States v. McCann*, 835 F. 2d 1184 (6th Cir. 1984), the U.S. Court of Appeals for the Sixth Circuit applied the *Solem v. Helm* analysis to the case of a Michigan defendant convicted under a federal statute. Defendant McCann pled guilty to several drug related charges including a charge of conducting a continuing criminal enterprise in violation of 21 U.S.C. 848. Defendant

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Congress to reconsider the wisdom of statutory mandatory minimum sentences. *Report of the Proceedings of the Judicial Conference of the United States*, p. 16 (Washington, D.C., March 13, 1990). In doing so, the Conference followed resolutions submitted by judges of the Third, Eighth, Ninth, and Tenth Circuits, reprinted in 135 Cong. Rec. *12703-12704 (daily ed. Oct. 5, 1989). In addition, the Federal Courts Study Committee, consisting of fifteen members appointed by the Chief Justice, recently issued its final report recommending repeal of statutory mandatory minimum sentencing provisions. 47 Crim. L. Rep. (BNA) 1057-1059.

received a sentence of life imprisonment without parole as provided by statute. On appeal the defendant contended that his sentence was so disproportionate to his crime that it was violative of the Eighth Amendment.

The Sixth Circuit acknowledged the deference that ought to be given to legislatures and sentencing courts but decided that an extended proportionality analysis was appropriate in *McCann* because like *Solem v. Helm*, it involved a sentence of life without parole, "a fact which on its own is perhaps enough to trigger an extended proportionality analysis." *McCann, supra* at 1188. After reviewing the facts, the Sixth Circuit confirmed that defendant McCann's drug enterprise was extensive and lucrative. Defendant, along with his codefendant, was responsible for hundreds of kilograms of cocaine importation. The drug operation involved several Latin American countries, and a substantial number of people. Defendant was not a mere "logistics man" but recruited people and supervised the activities of the operation. Furthermore, defendant was a lawyer and had been a successful business person prior to his drug involvement.

Applying the test in *Solem*, the Sixth Circuit Court of appeals found without question that the sentence of life without parole was extremely harsh. However, defendant McCann's crime was also great, involving a large, continuing enterprise in drugs and profits. Further, in comparing the *McCann* life sentence to other sentences imposed by federal courts for convictions of a continuing criminal enterprise, the Sixth Circuit found no significant disparity.

Finally, the Sixth Circuit noted that if defendant McCann had been tried under state jurisdiction in Michigan, he also would have received a mandatory life sentence without parole. The court stated "McCann could have received a mandatory life sentence in Michigan for activities substantially less blameworthy than the hundreds of kilograms of cocaine he was actually responsible for." *McCann, supra* at 1190. The Sixth Circuit affirmed his conviction.

Unlike McCann, Mr. Harmelin did not import hundreds of kilograms of cocaine. There is no evidence that he was a major player in any drug enterprise. His financial resources were meager. All indications are that he, like so many other defendants in Michigan caught in this law, was merely a mule of transport.

Unlike the defendant in *Helm*, Mr. Harmelin was not a recidivist. He had not had seven chances at rehabilitation. He had not proved to be incorrigible.

It is true that there is a huge amount of public pressure on our politicians to solve the drug problem. The Michigan Supreme Court, in its refusal to hear the issue, succumbs to the popular pressures described by Oliver Wendell Holmes in his first dissenting opinion as a member of the United States Supreme Court:

> "Great law, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously seemed clear

> seem doubtful, and before which even well settled principles of the law will bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401, 48 L. Ed. 679, 24 S. Ct. 436 (1904).

In his dissenting opinion in *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989), Justice Scalia voiced a similar sentiment regarding the implementation of a drug screening program for Customs officials. Justice Scalia criticized the Court for approving drug testing apparently because they believe that implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security. Justice Scalia said this law was designed to:

> "demonstrate the determination of the Government to eliminate this scourge of our society. I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 1401.

Justice Scalia quoted the famous Brandeis dissent in *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, at 572, 72 L. Ed. 944 (1928):

> "It is immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in

insidious encroachment by men of zeal, well-meaning but without understanding."

4. HARSHNESS OF PENALTY

Mr. Harmelin was sentenced to mandatory life imprisonment with no possibility of parole. He will die in prison.

There is an enormous difference between a lengthy sentence and a sentence of mandatory life with no possibility of parole. It is a difference in kind rather than degree. A prisoner serving a long sentence, even a sentence that looms into the twilight years of his life, can still keep his dreams alive. He can imagine, as he lays down in his cell at night, what he will do when he is finally paroled. He can plan what good things he can do to make up for the wrongs he has committed. He can dream of the things he can do to perhaps make this world a better place for everyone. He can dream of his loved ones, and how, once he is reunited with them, he will be able to spend hours with them, making up for lost time. He has a reason to obey the prison laws. He has a reason to act like a human being. He has a reason for living. His soul is alive. The very fact of having no possibility of release transforms an endurable punishment into a life shattered beyond all hope.

To take away everything that people hope and dream for in their lives, the big things and the little things, forever, with no hope of redemption, is a most profoundly harsh thing for a Government to do to one of its citizens. Such a punishment may well be appropriate

recompense for the most vicious of cruelties. But, what about a nonvicious person who makes a mistake in judgment?

Given the honored place of liberty in the constitution, harsh prison sentences imposed without the prospect of parole raise their own problems of enormity, irrevocability, and finality, as well as the need for procedural reliability and regularity. As Justice Clark once questioned in the context of procedural due process safeguards, "how can the Fourteenth Amendment tolerate a procedure which it condemns in the capital cases on the ground that deprival of liberty may be less onerous than deprival of life – a value judgment not universally accepted – or that only the latter deprivation is irrevocable? *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963)(Clark, J., concurring in the result).

Petitioner is aware that the Michigan Court of Appeals has rejected the claim of cruel and unusual punishment, and the Michigan Supreme Court has not decided the issue. Petitioner submits that a hundred or even a thousand such judicial decisions could not make right that which is so clearly wrong. Judges in Salem, Massachusetts, undoubtly approved the burning of witches at the stake, but their approval could not make it right. Our descendants will look back on this peculiar period of our history with horror and shame, much as we now look back on our ancestors' practice of setting fire to eccentric old women for the good of the community.

This Court has long held that the imposition of death by public authority is profoundly different from all other

penalties. This premise rests in part on reasoning inapplicable here. In *Lockett, supra,* the Court reasoned, "the need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various postconviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailabilty of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett,* at 438 U.S. 605.

In the instant case, the "flexibility" this Court has previously attributed to prison sentences does not exist. Petitioner must spend the rest of his life in prison, period.

This Court has oft stated the opinion that the penalty of death is qualitatively different from a sentence of imprisonment, however long and that death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Anyone who has paused to consider the issue must realize that a sentence that provides no hope of release is qualitatively different than one that does. Without action from this Court, petitioner can never regain his liberty.

From a practical point of view the economics of housing petitioner and other similarly situated prisoners is alarming. The cost of housing inmates into old age and

until they die is a needless draw on admittedly scarce resources.

The Michigan law was enacted to punish drug kingpins. In its zeal to clean up the drug problem, Michigan has enacted a law that has resulted in exactly the kind of "lightning bolt", "freakish" and "wanton" results which persuaded this Court to strike down the death penalty statute in *Furman v. Georgia, supra.*

5. SENTENCES FOR OTHER CRIMES IN MICHIGAN

The second criteria in the *Solem v. Helm* proportionality analysis is to compare sentences for other crimes in the same jurisdiction to see whether more serious crimes are subject to the same penalty or to less serious penalties. A punishment, otherwise appropriate, may be so disproportionate to the offense charged as to be cruel and/or unusual.

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California,* 370 U.S. 660, 667 (1962).

The Michigan statute in the instant case imposes a mandatory life penalty with no possibility of parole for possession of 650 grams or more of a mixture containing cocaine. The statute is equally applicable to a first-time offender as it is to an habitual criminal.

By comparison, only possession of 650 grams or more of a controlled substance and the commission of first-degree murder, MCL 750.316; MSA 28.548, are subject to mandatory life sentences. In contrast, second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(2), armed robbery, MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, bank robbery, MCL 750.531; MSA 28.799, kidnapping, MCL 750.349; MSA 28.581, taking of hostages by penal inmates, MCL 750.349(a); MSA 28.581(1), and fourth habitual felon, MCL 769.12; MSA 28.1084, carry terms of "life or any term of years."

In each of the foregoing offenses, the legislature has allowed the courts to exercise discretion in sentencing. None of these life offenses mandates imposition of a sentence of life imprisonment. None precludes the possibility of parole.

While the instant offense carries a mandatory life sentence with no parole, the maximum sentences for the following crimes in Michigan are enlightening: assault with a dangerous weapon, four years, MCL 750.82, 750.503; MSA 28.277, 28.771, assault with intent to maim, ten years, MCL 750.86; MSA 28.281, assault with intent to do great bodily harm less than murder, ten years, MCL 750.84; MSA 28.279.

A person with a long criminal record could commit the foulest atrocities, such as holding people captive for years as sexual slaves, hacking off limbs, or poking out

eyes of children, or attempting to assassinate public officials, without even the *possibility* of receiving a sentence as high as petitioner. In contrast, Mr. Harmelin had to receive a sentence of life without parole regardless of how the judge evaluated his character. The judge was compelled by statute to ignore the fact that Mr. Harmelin had absolutely no criminal record, that his offense was non-violent, that he harmed no one, that he did not display viciousness, that he did not demonstrate an inability to reform.

If the substance in Mr. Harmelin's trunk had turned out to be over 650 grams of cyanide, enough to kill hundreds of thousands of innocent people, he would have gone completely unpunished. Even if the police found with the cyanide a note in the petitioner's handwriting outlining a plot to use the cyanide to poison municipal water supplies, he still could not be punished as harshly as he has been for possessing cocaine.

In Michigan, the following scenerio could occur. A twenty-year old man could become enraged and shoot and kill his victim. If convicted of second-degree murder, he could be sentenced under the Michigan sentencing guidelines to as little as eight years. If he successfully completed parole, and murdered another victim, intentionally but not with premeditation, he could then be sentenced to as little as ten years. Now paroled at age forty, if he committed a third unpremeditated murder, he could still be sentenced to as low as fifteen years. Which person presents the greater threat to society?

If Mr. Harmelin had pulled out his gun and shot the officers to death, would we not think worse of him than

we do now? Why is that? It is because our feelings about the sanctity of human life require that we assign the intentional taking of life our highest level of condemnation, and that other crimes, however disapproved, simply cannot be considered to rise to that level of evil.

Michigan has a habitual felon statute which provides for a sentence of up to life imprisonment for a fourth felony conviction. MCL 769.12; MSA 28.1084. Michigan also has a drug recidivist statute which provides for enhanced penalties of up to twice the maximum penalty of the underlying crime. MCL 333.7413; MSA 14.15(7413). Both these statutes are available to punish those individuals who have shown by their behavior that they cannot conform to societal standards.

This Court has held that the Eighth Amendment requires individualized sentencing in capital cases. Jury discretion should be channeled to avoid arbitrary and capricious capital sentencing. *Furman v. Georgia*, 408 U.S. 238 (1972). A capital jury should be allowed to consider all relevant mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978). The use of aggravating and mitigating factors is a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. *Blystone v. Pennsylvania*, 110 S. Ct. 1078, 1083 (1990). This Court found that the constitutional defect in *Furman* was that unguided juries were imposing the death penalty in an inconsistent and random manner on defendants, and that provisions that suitably direct and limit a sentencing jury's discretion are necessary "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Under these circumstances, the

death penalty statute was found to pass constitutional muster.

It is also constitutionally imperative that the jury be allowed to consider mitigating evidence. The mandatory death penalty in *Woodson v. North Carolina*, 428 U.S. 280 (1976) was held invalid because it permitted no consideration of relevant factors of the character and record of the individual offender or the circumstances of the particular offense.

In the recent case of *Blystone v. Pennsylvania*, 494 U.S. ___, 110 S. Ct. 1078 (1990) upholding a Pennsylvania death penalty statute, this Court emphasized the importance of the opportunity for the sentencing jury to consider and give effect to all relevant mitigating evidence. Since the Pennsylvania statute did not limit the types of mitigating evidence which may be considered, by including the circumstances of the crime and the background of the defendant, the Court found the statute did not violate the Eighth Amendment. The Court also noted that the death penalty was not automatically imposed upon conviction for certain types of murder. It was imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances. *Blystone, supra* at 1082.

In Michigan, only conviction of possession of over 650 grams of a controlled substance and first degree murder mandate a sentence of life imprisonment with no possibility of parole. The class of defendants eligible for mandatory life for murder is narrowed by the elements of

first degree murder in Michigan. A jury receives the following instruction from the judge in a first-degree murder case: The government must prove beyond a reasonable doubt that the defendant intended to kill the victim, that the intent to kill was premeditated, that the killing was deliberate. Deliberate means that the defendant must have considered the pros and cons of that design and have measured and chosen his actions. The intent must be formed by a mind that is free from undue excitement. This excludes acts done on a sudden impulse without reflection [or as a result of a sudden fight]; and, that the killing was the result of real and substantial reflection. There must be such a lapse of time as would give the mind time to think about the purpose and intent of the killing. The law does not specify the length of that period, and it will vary with individuals and circumstances. The test is not the duration of time but the extent of the reflection. There must be sufficient time to afford a reasonable man time to subject his actions to a second look. *See Michigan Criminal Jury Instructions 16:2:01.*

Thus Michigan's sentencing scheme for first degree murder applies only to the most culpable murderers – those who murder in cold blood. Only they are sentenced to mandatory life in prison with no parole. Only those guilty of first-degree murder are considered so morally depraved as to have lost their right to live in society forever. Only those guilty of first-degree murder are considered to be beyond rehabilitation. The circumstances of the offense narrow the penalty from all murderers to those who are the most morally reprehensible.

By contrast, for the offense of possession of over 650 grams of cocaine, the government must only prove that

the defendant knowingly possessed over 650 grams of a substance containing cocaine. No proof is required that the defendant had an intention to kill. No proof is required that the defendant even had a reckless disregard for human life. No proof is needed that a death occurred as a result of the defendant's actions.

Significantly, in order to provide a bed for Mr. Harmelin for the rest of his natural life, other more violent offenders, such as rapists, armed robbers and second degree murderers will be released.

Perhaps one of the most surprising things the casual observer immediately notices is that a purity or concentration is not mentioned. The developed case law has held that it does not matter. *People v. Campbell,* 115 Mich. App. 369; 320 N.W.2d 381 (1982); *People v. Ward,* 133 Mich. App. 344; 351 N.W.2d 208 (1984). Whether the cocaine is 1% pure or 100% pure is of no consequence as long as the weight is over 650 grams. Practically speaking, the difference is tremendous. Assume defendant A has 6.5 grams of pure heroin. If arrested and convicted at that point, he faces a minimum sentence of probation and a maximum of 4 years. If defendant A is arrested an hour later after having cut and diluted the 6.5 grams of pure heroin down to 1% purity, he then, if convicted, faces life without parole. The inequity is apparent.

It seems equally unfair that it is not necessary that the government prove that the defendant knew personally that the amount of drugs he possessed was at least 650 grams. *People v. Cortez,* 131 Mich. App. 316; 346 N.W.2d 540 (1984).

Additionally, the law would allow a person to be convicted of the offense even if he is in constructive or joint possession with a number of other persons. Or a person could be convicted on the aiding and abetting theory. *People v. Harding*, 163 Mich. App. 298; 413 N.W.2d 777 (1987). This, too, would and has allowed a number of people to be convicted for possessing the same substance and receiving the mandatory sentence.

6. SENTENCES FOR DRUG CRIMES IN OTHER STATES

A third criteria under the proportionality test set forth in *Solem v. Helm, supra*, is a comparison of the sentence imposed for commission of the same crime in other jurisdictions. In *Helm*, this Court examined the sentences Helm could have received in other states and noted that only one other state, Nevada, allowed the imposition of a sentence of life without parole for a seventh habitual criminal.

Michigan is the only state in the country which mandates a sentence of life imprisonment with no possibility of parole for the possession of 650 grams of cocaine. Only one other state, Alabama, has a similar mandatory sentence of life imprisonment with no parole and that is for the crime of possession of over ten kilograms of cocaine. (Pet. App. chart of drug penalties in other states) If Mr. Harmelin had been convicted in Alabama, he would have been subject to a five year mandatory minimum term of imprisonment for the offense of possession of from 500 grams to one kilogram of cocaine. For one kilogram to ten kilograms, Alabama mandates a minimum of fifteen

years. Only possession of over ten kilograms of cocaine is punished by mandatory life imprisonment in Alabama.

Eleven states provide a possible sentence of up to life imprisonment for Mr. Harmelin's offense. All of these states, however, provide for parole: Connecticut after the defendant serves the minimum sentence; Idaho, parole after ten years; Kansas, parole after fifteen years; Missouri, parole after five years; Montana, mitigating factors considered at sentencing; Nevada, parole after serving minimum; New York, parole after serving minimum; North Dakota, parole after thirty years less sentence reduction for good time credits; Oklahoma, sentence can be suspended for first time offenders; Rhode Island, departure from minimum allowed for substantial and compelling reasons; Tennessee, parole after nineteen years; and Texas, parole after twenty years.[8]

Parolability was a factor deemed crucial in this Court's decision in *Solem v. Helm, supra*. It was precisely the possibility of parole which distinguished this Court's decision in *Rummel v. Estelle, supra*, from *Solem v. Helm*.

The dissent in *Solem* was based on reasoning not applicable here. The dissent felt that the differences between the sentences of Rummel and Helm were insubstantial:

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[8] Many of these inmates may be released earlier because of good time credit which we were unable to discern. Without action by this Court, Mr. Harmelin will spend his entire life behind bars. The present governor of Michigan, in office since 1983, has pardoned one convicted murderer and no drug prisoners. Given the climate of hysteria over the war on drugs, it is reasonable to assume that no elected official would risk taking this action, no matter how right the cause.

"The Court's opinion necessarily reduces to the proposition that a sentence of life imprisonment with the possibility of commutation, but without possibility of parole, is so much more severe than a life sentence with the possibility of parole that one is excessive while the other is not. This distinction does not withstand scrutiny; a well-behaved "lifer" in respondent's position is most unlikely to serve life." 316 U.S. at 463.

The dissent continued:

"In short, there is a significant probability that respondent [Helm] will experience what so many "lifers" experience. Even assuming that at the time of sentencing respondent was likely to spend more time in prison than Rummel, that marginal difference is surely supported by respondent's greater propensity for crime-and for more serious crime at that."

* * *

"It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant the conclusion that respondent is incorrigible." 316 U.S. at 317.

Petitioner does not contest the dissent's opinion that this court should not be required to apply the porportionality test in cases where a state has identified a criminal offender whose record shows he is a chronic recidivist who will not abide by the law.

Petitioner does not argue with the fact that in general "legislatures are far better equipped than we are to balance the competing penal and public interests and to

draw the essentially arbitrary lines between appropriate sentences for different crimes." *Solem v. Helm*, at 314.

But in the present climate of the war on drugs, few politicians seem willing to risk the potential backlash of appearing soft on drug crimes. A higher authority, a Court which is above transient political pressure, which can decide issues through reason and not emotion, must be pressed into action.

7. SENTENCING UNDER FEDERAL LAW

No other jurisdiction in the United States has penalties even coming close to the harshness of Michigan's. Indeed, under federal law, if a first offender possessed the same amount of cocaine as did Mr. Harmelin, the maximum penalty would be a term of not less than five or more than forty years in prison. 21 U.S.C. Sec. 841 (b)(1)(B)(ii). Mr. Harmelin would have received a significantly lighter sentence than he did under state law, even under the "toughened" Sentencing Guidelines which are in effect today. Under the *United States Sentencing Commission Guidelines* Mr. Harmelin's base level is 26 which provides for a 63 to 78 month sentence. If, however, the sentencing court considered Petitioner an organizer, leader, manager or supervisor of a drug operation the sentence could have been enhanced to levels which provide for a 78 to 97 months sentence. It should be noted that Mr. Harmelin was carrying a firearm. He had a valid permit to carry the gun. If, however, one wished to enhance his sentence by arguing that a firearm was used

in the commission of the offense, and couple this enhancement with the organizer provision, the maximum sentence under the guidelines would still be only 97 to 121 months. Thus, under the worst case scenerio Mr. Harmelin's sentence in federal court would be between 97 and 121 months. *See United States Sentencing Commission Guidelines* Section 2d1.1. (November 1987) (November 1, 1989 Amendments to Guidelines).

Under federal law the only possibility of a mandatory minimum of life without parole is under Title 21 U.S.C. Sec. 848, the Continuing Criminal Enterprise Statute (often referred to as the drug kingpin statute). In order to convict an individual under this statute, a person has to be an organizer, supervisor, or manager of five or more people; commit a continuing series of violations; derive substantial resources from the activities; and the organization must have grossed at least ten million dollars per year, or alternatively, distributed 150 kilograms of cocaine. Absent a conviction under the Continuing Criminal Enterprise Statute, the only time a person can receive a sentence of life imprisonment is if aggravating factors resulting in death or serious bodily injury are present.

Finally, it must be remembered that in the federal system, under Rule 35 of the Federal Rules of Criminal Procedure the government may move for a reduction of defendant's sentence to a term under the mandatory minimum of the Sentencing Guidelines if defendant has provided substantial cooperation or assistance to the government. Michigan has no such provision.

Based of the foregoing data it is clear that Michigan's penalty for possessing 650 grams or more of a substance containing cocaine is by far the harshest in the country. It is so far out of step with both the federal law and the laws of other states, that it fails to conform with evolving standards of decency and the Eighth Amendment.

CONCLUSION

For the foregoing reasons, this Court should hold that the Michigan sentencing statute in this case is unconstitutional.

Respectfully submitted,

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MCL 333.7403. Possession of controlled dangerous substance; penalties

Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance or an official prescription form or a prescription form unless the controlled substance, official prescription form, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv),[1] and:

(i) Which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life.

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years.

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[1] Section 333.7214(a)(iv).

(iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that controlled substance is guilty of a felony, and shall be imprisoned for not less than 1 year and not more than 4 years, and may be fined not more than $25,000.00 or placed on probation for life.

(v) Which is in an amount less than 25 grams of any mixture containing that controlled substance is guilty of a felony, punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

(b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(c) Lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(d) Marihuana, is guilty of misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(e) An official prescription form, is guilty of a felony, punishable by imprisonment for not more than 1 year, or a fine of not more than $2,000.00, or both.

(f) A prescription form other than an official prescription form, is guilty of a misdemeanor, punishable by

imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(3) The court may depart from the minimum term of imprisonment authorized under subsection (2)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

Amended by P.A. 1988, No. 47, § 1, Eff. March 30; P.A. 1988, No. 60, § 1. Eff. Aug. 1, 1989; P.A. 1989, No. 143, § 1, Eff. Sept. 28.

MCL 333.7214. Schedule 2; substances included

Sec. 7214. The following controlled substances are included in schedule 2:

(a) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(iv) Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

LAW LIBRARY

HOUSE BILL 4190 (as passed by the House)
Sponsor: Rep. Paul Rosenbaum
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Despite the efforts of law enforcement and drug education personnel, there has been a steady increase in narcotics traffic and drug abuse in Michigan, with a corresponding increase in drug-related crime. Some persons claim that the state has failed to stem drug traffic because the penalties for drug dealing are not severe enough, and law enforcement tools are inadequate. They contend that the potential for profit in drug dealing is so great that Michigan's present penalties pose little or no deterrent to would be violators, with lenient probation and parole policies weakening the threat of imprisonment still further. Police officers involved in narcotics investigation also complain that they are arresting the same persons over and over because convicted drug dealers are quickly returned to the illicit drug scene through probation and parole. Further, it is claimed that the top drug dealers are so far removed from the "street scene" that only increased investigatory powers including wiretapping can result in their apprehension and conviction.

THE CONTENT OF THE BILL:

The bill would change the penalties in the Controlled Substance Act of 1971 for the illegal possession or sale and delivery of Schedule 1 or 2 narcotic drugs (opium

and its derivatives, including heroin) and cocaine, as follows:

ILLEGAL MANUFACTURE, DELIVERY, OR POSSESSION OVER 50 GRAMS (1¾ ounces) OF ANY MIXTURE CONTAINING THESE SUBSTANCES

650 grams or more (23 oz. or more) – mandatory life imprisonment

225 to 649.99 grams (8 to 23 oz.) – mandatory 20 to 30 years imprisonment

50 to 224.99 grams (1¾ to 8 oz.) – either mandatory 10 to 20 years imprisonment, or probation for life

These prison terms could not be suspended and could not run concurrently with a prison sentence for another felony. Except for the optional sentence of probation for life for the 50 - 224.99 gram offense, there would be no parole or probation possibility. Second or subsequent convictions would carry a mandatory life imprisonment penalty.

Present Penalties:

Manufacture or delivery of schedule 1 or 2 narcotic drugs: imprisonment up to 20 years and/or a fine up to $25,000 at the court's discretion.

Manufacture or delivery of cocaine: imprisonment up to 7 years and/or a $5,000 fine.

Possession of schedule 1 or 2 narcotic drugs: imprisonment up to 4 years and/or a $2,000 fine.

Possession of cocaine: imprisonment up to 2 years and/or a $2,000 fine.

ILLEGAL MANUFACTURE OR DELIVERY LESS THAN 50 GRAMS

Imprisonment for up to 20 years and/or a $25,000 fine, at the court's discretion. (Same as present penalty.)

ILLEGAL POSSESSION LESS THAN 50 GRAMS

Imprisonment for up to 4 years and/or a fine up to $2,000. (Same as present penalty.)

ILLEGAL USE OF A CONTROLLED SUBSTANCE

Penalties for the illegal use of a controlled substance would remain the same, except for the fine for cocaine use, which would be increased from $1,000 to $2,000.

SALE TO MINORS

Presently, an adult who gives or sells a schedule 1 or 2 narcotic drug to a person under 18 and at least 5 years younger than the adult may be fined up to $25,000 and/or imprisoned up to 40 years – double the prison term otherwise authorized for manufacture or delivery. The bill would include the distribution of cocaine in this "double maximum" provision.

FIRST OFFENSE

Presently, in the case of a first violation for possession of any controlled substance, the court has the option of deferring proceedings and placing the violator on probation. If the person then meets the conditions of probation, the case is dismissed without an adjudication of guilt. The bill would exempt first violations for possession of schedule 1 or 2 narcotic drugs and cocaine in amounts over 225 grams from this option.

PLEA-BARGAINING

Once a defendant had been arraigned on a warrant, indictment, or information for one of the mandatory sentence offenses (225 or more grams of schedule 1 or 2 narcotics or cocaine), or conspiracy to commit such an offense, dismissal upon the motion of the prosecuting attorney could only be "with prejudice" that is, a dismissal which precluded any further action on the same charge. Further, the prosecuting attorney could not reduce the charge if at the end of the preliminary examination it appeared to the examining magistrate that 1 or more of the offenses had been committed and there was probable cause to charge the defendant. The bill would also prohibit the court from accepting a plea of guilty, guilty but mentally ill, or nolo contendere to any lesser offense without such a plea to 1 of the mandatory sentence offenses (50 or more grams).

AUTHORIZED DISTRIBUTION OF CONTROLLED SUBSTANCES

Under the present law, certain persons such as pharmacists may be registered to legitimately dispense, prescribe, manufacture, or study controlled substances. This registration may be denied, suspended, or revoked if the person has filed a fraudulent application, violates any state or federal drug law, loses his/her federal registration, or promotes any controlled substance to the general public. The bill would specifically state that the registration authorizes only the manufacturing, prescribing, or dispensing which is for legitimate medical or therapeutic purposes and in the course of the registrant's professional practice. Unauthorized manufacturing, prescribing, or dispensing could result in loss of registration, as could

violation of any provision of, or rule promulgated under, the Contolled [sic] Substance Act of 1971. In addition, a registered practitioner who illegally dispensed, prescribed, or administered a controlled substance would be subject to prosecution for illegal manufacture, delivery, or possession of a controlled substance.

The bill is tie-barred to House Bills 4191, 4192, 4193, 4194 and 4195.

The effective date of the bill is specified as September 1, 1978.

FISCAL IMPLICATIONS:

The House Fiscal Agency has recommended that the bill be referred to the Appropriations Committee on the basis of the fiscal effect for offenders caught with possession of more than 50 grams of narcotics or cocaine. They state, "according to the Department of Corrections annual report, there were 15 offenders in prison for sale of narcotics with a maximum of life imprisonment at the end of 1974. If this bill were in effect, their sentences would be mandatory life. There were also 129 offenders in prison for unlawful sale and distribution of narcotics which carries a present maximum of 20 years. It is impossible to tell which category these offenders would fall into, as there is no way to determine the quantity of narcotics with which they were caught; however, with an estimated annual cost of $5,000 per prisoner year, the long-range costs of this bill would be enormous and the prison population would greatly increase."

The Department of Attorney General notes that whenever legislation of this nature is passed, the department charged with enforcement looks to the Attorney General to provide legal advice and counsel, increasing the overall demand for legal services and necessitating increased funding for the Department of Attorney General. In addition, legislation such as this often leads to more litigation which also requires enlargement of the Attorney General's staff.

The Department of Public Health believes that, if the bill proved effective, the number of addicted inmates in prison would increase, and that unless treatment programs including methadone maintenance in prison were significantly expanded, control problems and substance abuse among inmates would increase measurably. In this event, the department would expect the Department of Corrections to request a dramatic expansion of its substance abuse contractual relationship with the Office of Substance Abuse Services. The department also points out that the bill could increase court costs significantly, since the severe proposed penalties would lead many defendants to request jury trials. In addition, at the local level, the staffs of judges, prosecutors, and enforcement agencies would probably be expanded.

BACKGROUND INFORMATION:

In 1973, the state of New York enacted the nation's toughest drug laws, with mandatory minimum sentences of 15 years to life imprisonment for possession of 2 ounces or more, or sale of 1 ounce or more of a narcotic drug. The question of the success or failure of these laws is still

highly controversial. Those in favor of the law claim that it has helped stem an epidemic rise in narcotic addiction. Critics of the law insist that it is a false solution which has accomplished nothing while doing great harm to enlightened criminal justice. Statistics from New York now indicate that despite substantially increased enforcement efforts and expenditures, the stiff New York drug laws have not reduced the state's drug problem. Opponents of House Bills 4190 - 4195 maintain that this apparent failure is due to flows inherent in any legislation which attempts to use a tough, mandatory sentencing approach to solve the heroin problem. Supporters of the bills, however, deny that the New York laws have clear applicability, stating that House Bills 4190 - 4195 are significantly different in several areas. In particular, they point out that the bills are specifically aimed at a higher echelon of drug dealing, and that the prohibition on plea bargaining is drafted to avoid the problems that the rigidity of the New York laws has caused. Many opponents of the New York law favor the British method of dealing with the narcotic problem, which allows physicians to legally prescribe morphine or heroin for addicts. As with the New York laws, the success of the British method is open to great controversy. Its proponents claim that it has eliminated black-market drug dealing and related crime, while offering a greater opportunity for addicts to lead useful lives. Its critics claim that legalized addiction does not truly rehabilitate addicts, and that governmental sanction of drug abuse is unhealthy, unethical, and unwise.

ARGUMENTS ADVANCED FOR AND AGAINST THE BILL:

For:

All of society is a victim of the illicit drug scene. Not only does widespread narcotic addiction cause a serious loss of human resources, but black-market drug dealing creates a spiral of drug-related crime. The magnitude of the narcotics problem in Michigan necessitates tougher law enforcement policies. The penalties imposed by the bill for major drug dealing are severe, but they are not inappropriate in terms of the harm drug dealers do to society.

For:

The severe penalties imposed by the bill would have an important deterrent effect on illicit drug dealing. With the present drug penalties and parole possibilities, dealers feel that if caught they will spend little or no time in prison. The risk to them seems relatively small, and the potential for profit great. Consequently, only more severe penalties and the certainty of punishment will serve to deter would-be violators. The bill also contains an important exception to the mandatory prison sentence provisions by allowing a life probation option in the 50 to 224.99 gram offense category. This could be used as an incentive for lower-echelon drug dealers to give valuable information on major drug dealers.

For:

The bill would ensure that persons convicted of drug dealing spend substantial periods of time in prison. By keeping drug dealers off the streets for longer periods of

time, it will help reduce illicit drug activity. Further, it will help improve police morale.

Against:

Instead of ensuring that the state's major drug dealers spend substantial periods of time in jail, the bill could backfire. Convictions on drug charges could become more difficult to obtain, because juries might be more apt to acquit in reaction to the severe penalties. In addition, it has been suggested that one possible negative consequence of the bill would be that major drug dealers who are the intended target of the legislation might use addicts to transport large quantities of drugs rather than take the risk of facing long mandatory prison sentences themselves. If this happened, the drug traffic would continue and only addicts, who are already "victims" of the drug scene, would be faced with long prison sentences.

Against:

The bill would provide stiff, mandatory penalties for the illegal sale of cocaine, identical to the penalties for narcotics. This is unwarranted. Cocaine is not a narcotic and the physiological effects of cocaine are substantially different from those of heroin and other opiates. Furthermore, quantities of cocaine and heroin are not equivalent in terms of potency or market value. Consequently, the effect of the bill is to provide stiffer penalties for cocaine than for heroin.

For:

While cocaine does not have the addictive effect of heroin, the bill's grouping of cocaine with heroin is justified. Because the profit margin for cocaine is nearly as high as for heroin, with fewer risks, cocaine dealing is a fast-growing phenomenon, often involving people who also deal heroin. It is further claimed that because of the high profits, cocaine dealing now generates related criminal activity.

Against:

Severe, mandatory prison sentences are a simplistic approach to the complex problem of illicit drug activity. There is no real evidence that they will serve as a deterrent to crime. A deterrent effect could be reasonably hoped for only if the state could ensure certainty of apprehension as well as certainty of punishment.

Given size of the state's addict population and the potential for profit, new dealers would quickly take the places of those sentenced to mandatory jail terms. Meanwhile, the problems which provoke and foster drug addiction remain unaddressed. In fact, many critics of the strict law enforcement approach to drugs believe that it is not only a futile method, but one that ultimately worsens the problem. When one major heroin channel is broken and the supply decreases, the price of heroin increases proportionately, and profitability soars. This can create a type of "crime inflation", since the price of heroin appears to have a direct effect on street crime.

Against:

Mandatory minimum sentences undermine the modern concept of criminal justice, which endeavors to treat individual defendants separately, fairly, and with due process of law. The bill stresses punishment and thwarts rehabilitation. If prisons are to be "correctional" instead of punitive, prisoners must have incentives to participate in prison rehabilitation programs. By requiring a fixed prison term, with no possibility of parole, the bill destroys that incentive.

Further, the bill could impose an intolerable burden on the state's courts and penal institutions, because criminal defendants faced with severe mandatory sentences would insist upon jury trials, and long prison terms with no possibility of parole would quickly overload the already overcrowded prisons.

Against:

The power to sentence should belong to judges; the bill would, in effect, shift that power from judges to prosecutors. Sentencing judges must have unrestricted power to choose an appropriate sentence according to the condition of the defendant, the record of prior criminal activity, and the requirement of public protection. Discretion in sentencing is particularly important on drug offenses, because so many violators are victims of their own addiction and poverty.

It has also been suggested that so severely restricting prosecutorial discretion in post-arraignment proceedings may be violative of the separation of powers doctrine.

POSITIONS:

The Detroit Police Department, Narcotics Section supports the bill. (3-8-77)

The Michigan District Judges' Association Legislative Committee supports the bill. (3-8-77)

The Michigan Sheriffs' Association supports the bill. (3-8-77)

The Michigan State Police support the bill. (3-8-77)

The Wayne County Organized Crime Task Force supports the bill. (3-8-77)

The State Board of Pharmacy within the Department of Licensing and Regulation supports the bill as reported out of the House Judiciary Committee. (3-8-77)

The Michigan Association of Chiefs of Police supports the bill. (3-8-77)

The Prosecuting Attorneys Association of Michigan supports the bill. (3-8-77)

The Michigan Council on Alcohol Problems opposes the bill. (5-38-77)

The Department of Attorney General does not support the bill. (3-24-77)

The Department of Public Health does not support the bill in its present form. The Office of Substance Abuse Services, within the department, believes that the imposition of drastically increased penalties against drug traffickers must be accompanied by serious consideration of expanded treatment and rehabilitation activities to assure adequate care for addicted persons. (4-8-77)

POSSESSION OF OVER 650 GRAMS IN OTHER STATES

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
ALABAMA (Code of Ala)	13-A-211 (Distribution)	Class B Felony punishable by 2-20 yrs (per 13A-5-6)	(Mandatory life sentence for over 10 kilos)
	13-A-212 (Possession)	Class C felony punishable by 1-10 yrs.	
	13 A-12-231 (Trafficking)	500g-1 kilo mand. min 5 yrs. fine $100,000 (or less)	
ALASKA (Alaska Stats.)	11.71.030 (See Appendix A – Agg & Mitigating sentence factors)	Class B penalty punishable (per 12.55.125(a) – penalty prov.) as follows 1st offense 0-10 yrs. 2nd offense 4-10 yrs. 3rd offense 6-10 yrs.	No life sentence
ARIZONA (Revised Statutes Annotated)	13-3408(A)(1) Possession	13.701(c)(3) 4 yrs.	No life sentence
	13-3408(A)(2) Possession for sale	Punishable by 7 yrs. unless hab. off. or increased by 25% for agg. factors or decreased by 50% due to mitigating factors	
	13-3408(A)(7) Transporting for sale		

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
ARKANSAS	Ark Stats § 5-64-401	Possession = 2 to 5 years, $10,000, Manuf., del, over 400g, 40 yrs & $250,000	No life sentence
CALIFORNIA (West's Ann. Calif. Codes)	Calif. Health & Safety Code § 11351 Poss. for sale	2,3,4 yrs.	No life sentence
	§ 11352 Transporting sale, giving away	3,6, or 9 yrs § 11370.4(2) if more than 3lbs add 5 yrs to sent. (3) more than 25 lbs add 10 yrs. (4) more than 100 lbs. add 15 yrs.	Penal Code § 300 Parole after term set by 1170 of penal code § 1170 presumes sent at middle term unless agg or mitigating circumstances
COLORADO (Colo Rev. Stats.)	18.18.105(3) (unlawful distribution, manuf., dispensing, sale or possession) 18.1.105 (penalty prov.)	28g or more of material containing cocaine 4-16 yrs. $3,000 – 750,000 Mand. Min. 4 yrs.	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
CONNECTICUT (Conn. Gen. Stats. Ann.)	CGSA 21a-279	First offense 0-7 yrs	Life sentence. Parolable after minimum sentence
	CGSA 21a-278(a) 54-125	Possession with intent to sell 1 ounce of cocaine or more (1/2 oz. of coke in free base form). Min. (if not drug dependent) 5-20, Max-life	
DELAWARE (Del. Code Ann.)	16 § 4751(a) 11 § 4205	Addict up to 25 yrs and $5,000.00 to $50,000.00 Non addict $25,000.00 to $100,000 & min. 30 yrs without parole	No life sentence. Parolable after 30 years
DIST. OF COLUMBIA (D.C. Code)	§ 33-541(a)(2)(A) § 33-541(c)(1)(A)	4-15 yrs. $1,000 or both Mand. min. 4 yrs (c)(1)(A) (c)(2) Mand. min. can be suspended if no prior VCSA conv. & defendant is still addict	No life sentence
FLORIDA (West's Fla. Stats. Ann.)	893.13 Manufacture, possession, sale	up to 15 yrs 15 yrs, 400g or more	No life sentence
	893.135 Trafficking	mand. min 15 yrs. 400g or more	

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
GEORGIA (GA. Code Ann.)	79A-811[16-13-30] (a) possession	2 to 15 yrs (2nd or subseq offense 5 to 30)	Life for 2nd offense
	(b) Manuf., del, disp, adminstr, sale, poss w/i del	5 to 30 (2nd offense "shall be imprisoned for life")	
	79 A-811 [16-13-31] Sale, manuf, del, brings into state	400g or more $1 million fine, Mand. min. 25 yrs.	
HAWAII (Hawaii rev. Stats.)	329-41(a)(1) & (b)	not more than 5 yrs. nor more than $5,000.00 or both	No life sentence
IDAHO (Idaho Code)	ICS 32-2732(a)(1)A 20-233(a)	Up to life, $25,000.00 or both	Life. Parolable after 10 yrs. [per 20 -233(a)]
ILLINOIS	SHA 56 1/2 § 1401(a)(1)(2) 56 1/2 § 1401.2(2) 56 1/2 § 1401(a)(11)	not less than 12 nor more than 50 yrs. Up to $500,000.00	No life sentence
INDIANA (Indiana Stats. Ann.)	ISA 35-48-4	3g or more, 30 yrs., $100,000.00	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
IOWA (Code Ann.)	204.401(1) (a) (b) (2) (a) 21-4501 (penalties)	500g-1 kilo of cocaine (or 5-50g crack cocaine is Class C felony)	No life sentence
		3 to 5 yr minimum; 10 to 20 yr max, not more than 25 yrs.	
KANSAS (Stats. Ann.)	KSA 65-4127	life imprisonment	Life sentence. Parolable after 15 years without good time credit reduction
KENTUCKY (Rev. Stats)	KRS 218A-990(1)	$5 to 10 yrs $5,000-$10,000 or both. Each Subseq. VSCA off 10 to 20 yrs. $10,000.00-$20,000.00 or both	No life sentence
LOUISIANA	LSARS 40-967(A)&(B)(F)	400g or more, 15 to 30 yrs at hard labor. $250,000 to $600,000	No life sentence. Apparently parolable because not explicitly precluded for offense involving powdered cocaine.
			Parole precluded for offenses involving crack 40-967(B)(3)
MAINE (Maine Rev. Stats.)	17A § 1103(3)	14g or more (per 17A § 1252). 0 to 10 yrs. $10,000	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
MARYLAND (Code 1957)	Code 1957 27-286(F)(1)&(3)	448g or more. 0 to 20 yrs. $25,000, or both. Mand. min 10 yrs.	No life sentence. Parolable after 10 years.
MASSA-CHUSETTS (Ann Laws of Mass.)	94C: § 32A	2 1/2 to 10 yrs in prison or not more than 2 1/2 yrs in jail, not less than $1000 nor more than $10,000. Mand min. of 1 yr.	No life sentence. Mand. Min. of 1 yr.
MINNESOTA (Stats. Ann.)	MSA 152.021(1)&(2)	0 to 30 yrs not more than $1 million or both	No life sentence
MISSISSIPPI	Code 1972 41-29-139(b)(1)	0 to 30 yrs, not more than $1 million or both	No life sentence
MISSOURI	195.202 (Possession)	Class C felony punishable by term up to 7 yrs [per 558.00(3)]	For sentences of 9 yrs or less at 1/3 of sentence.
	195.211 (Dist, Del, Manuf)	Class B felony 5 to 15 yrs [per 558.001(2)]	Sentences of 9 to 15 yrs at 3 yrs.
	195.222 (Trafficking, first Degree)	10 to 30 yrs or life, no parole	5 yrs for sentences of 15 yrs or more including life imprisonment
	195.223 Trafficking, 2nd degree	10 to 30 yrs or life, parolable	

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
MONTANA	MCA § 50-32-101 to 50-32-405 and 45-9-101 (crim penalty prov.)	2 yrs to life $50,000 (except as provided in 46-18222 – agg & mit. circumstances – Appendix C)	Life sentence but use of agg & mit.
NEBRASKA	R.R.S. 28-146(4)&(5)	7 oz or more max 50 yrs, mand min. 5 yrs.	No life sentence
NEVADA (Rev. Stats)	N.R.S. 453.3395 .458.3405	400 g or more, 15 to life not less than $250,000	After serving minimum
NEW HAMPSHIRE (Revised Stats. Ann)	NHRSA 318 B: 26(1)(a)	5 oz or more, 0 to 30 yrs, $500,000 or both, poss life for habitual drug offender	Life for habitual offender
NEW JERSEY (Statutes Ann)	NJSA 2C: 35-5(a)(1)&(b)(1) 2c: 43-6 (crim penalty prov. for 1st degree crime)	1st degree crime for 5 oz. or more, 10 to 30 yrs, up to $300,000	Min. sent. at or between 1/3 to 1/2 of maximum, during which defendant ineligible for parole. But per 2c: 35-12, prosecutor may waive mandatory minimum in plea negotiations.

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
NEW MEXICO (Stats Ann)	NMSA 30-31-20(B) 31-18-15 31-18-15(C)	2nd degree felony, 9 yrs. and/or $10,000	Parolable
		2nd or subsequent offense, 1st degree felony = 18 yrs.	
NEW YORK (Penal Law)	220.43 (2 oz or more) sale	AI felony; max life, min 15 to 25	After serving minimum
	220.42 (1/2 oz or more) sale	A II felony; 3 to 8 min; max life	
	220.06 (poss. w/i del.) 70.00 (penalty prov.)	Class D felony, Max sent. 7 yrs and min. 1 yr	
NORTH CAROLINA	B.S. 90-95(a)(1) 90-95(h)(3)(C)	28-200g, Class G felony, at least 7 yrs & $50,000 200g to 400g, Class F felony; at least 14 yrs & $100,000	
		400g or more, Class D felony, not less that 35 yrs and $250,000	
NORTH DAKOTA	NDCC 19-03-1-23.101 12.1-32-01	Class AA felony up to life for 500g or more (per 19.03.1 – 23.1(a)(C)(2)(b)	After 30 yrs in minus reduction for good time [12. 1-32-01.(1)]

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
OHIO	RC2925 (contr subs. act) RC2911 (pen. provs.)	3rd degree felony, 1 to 10 years, up to $5,000	No life sentence
OKLAHOMA (Stats. Ann.)	63 § 2401(a)(1) dist., disp, poss, w/i del.	(B) (1) Not less [illegible] 5, nor more than Life and fine not more than $100,000. Sent. can be suspended/ deferred for first time offenders.	Life suspension for first time offenders
		(c) subsequent VCSA felony – penalty can be doubled	
	63 § 2402 unlawful poss.	(B)(1) 2 to 10 yrs	
		(C) Subsequent violation 4 to 20 years.	
OREGON (Rev. Stats.)	ORS 475.992(1)(b) Penalty provisions 161.605 (prison terms) 161.625 (fines)	Class B felony 10 years, not more than $100,000	No life sentence
PENNSYLVANIA	35 PS 780.113 (F) (1)	0 TO 15 yrs., up to $250,000 or both	No life sentence

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
RHODE ISLAND	RI21-28.401(A)(1)(A) (2&(B) 102 to 1 kilo 21-28.4.01.2	1 oz to 1 kilo – mand. min 10 yrs & possible min of 50 yrs.	No life sentence
		Drug addicted person (A) (2) 30 yrs & $100,000 more than 1 kilo-20 yrs to life, departure from minimums allowed for substantial and compelling reason.	
SOUTH CAROLINA	Code 1976 44-53-370(e)(2)(e)	400 g or more mand. min of 25-30 yrs., $200,000	After 19 yrs on life sentence
SOUTH DAKOTA	SDCL 22-42-2	10 yrs, $10,000, Mand min of at least 1 year.	No life sentence
TENNESSEE	TCA 39-6-417(c)(1)(E)	30g or more, 10 to life, up to $200,000(c)(2)	After 19 yrs. on life sentence
TEXAS	Tx Health Code 481.116	400g or more, life	On life sentence after 20 yrs.

STATE	CITATIONS	PENALTY	PAROLE ELIGIBILITY (IF INDICATED)
UTAH	UCA 58-37-8 (1) (a) (i)	1 to 15 yrs., If firearm used, 1 year consecutive (at least) and may be 4-5 years term	No life sentence
VERMONT	T 16 § 423	Sale of 1 ounce or more, 0 to 20 years, up to $1 million or both	No life sentence
VIRGINIA	Code 1950 54 § 18.2-248	5 to 40 years & up to $100,000	No life sentence
WASHINGTON	West SRCWA 69.50.40(a)(1)	2 kilos or less, 0 to 10 years, up to $25,000	
WEST VIRGINIA	Code 60A-4-401	1 to 5 years or up to $15,000 or both	
WISCONSIN (Statutes Ann.)	W.S.A. 161.41(c)(3)	more than 30g, 1 to 15 years, $1,000 to $500,000	
WYOMING	W.S. 35-7-1031	0 to 20 years, up to $25,000 or both	